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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 991

ESTATE OF SOL SCHILDKRAUT, Deceased, EUGENE SCHILDKRAUT and LESTER SCHILDKRAUT, Executors,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Eugene Schildkraut and Lester Schildkraut, as Executors of the Last Will and Testament of Sol Schildkraut, deceased, respectfully pray that a writ of *certiorari* issue to review the judgment or order of the United States Court of Appeals for the Second Circuit, entered October 27, 1966, reversing in part and affirming in part a decision of the Tax Court of the United States, entered September 3, 1965, determining a deficiency in federal estate tax due from petitioners in the amount of $116,991.65 (R. Vol. II, 22).

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported in 368 F. 2d 40, and is appended hereto, Appendix A (R. Vol. II, 2-21).

The Findings of Fact and opinion of the Tax Court are reported at 24 TCM 1215 (R. Vol. I, 21a).

Jurisdiction

The date of the judgment or order sought to be reviewed is October 27, 1966 (R. Vol. II, 22). The date of an order denying a petition of the Commissioner of Internal Revenue for rehearing and suggestion for rehearing *en banc* is November 25, 1966 (R. Vol. II, 30-36).

The jurisdiction of this Court is invoked under Section 7482 (a) of Title 26, and Section 1254 of Title 28, of the United States Code.

Questions Presented

Decedent's Will, Article "SEVENTH", leaves $300,000 in trust for the benefit of his surviving spouse and a qualified charitable foundation with tax exempt status. His surviving spouse is entitled for life to $1,000 per month payable out of income or out of principal if income is insufficient. Income in excess of $12,000 per year is payable to the charity. It is mandatory that principal of the trust be invaded to pay to the surviving spouse for life: 1) Deficit in income under $12,000 per year; 2) federal and state income taxes on the income paid to her; and 3) real estate taxes on her Palm Beach, Florida, residence. On the death of the surviving spouse, the remainder of the Trust Fund goes to the charitable foundation. Thus, all principal of the Trust Fund goes to the surviving spouse and the charity. The Court of Appeals, reversing the Tax Court,

allowed a charitable deduction, but, affirming the Tax Court, denied any marital deduction. The questions presented are:

1. Whether an imperative power in decedent's surviving spouse, exercisable in all events during her life, to consume a specified portion of principal of a testamentary trust, coupled with her entitlement for life to all income from such portion, as well as to a specific portion of all the income from the entire interest, payable monthly, constitutes a power of appointment, and qualifies as a marital deductible specific portion interest under Section 20.2056 (b)(5) of the Internal Revenue Code of 1954?

2. Whether petitioners are entitled, under Section 2056 (b)(5) of the Internal Revenue Code of 1954, to a marital deduction from the gross estate of the decedent for the commuted value of the property interest in principal which passed from decedent to his surviving spouse under Article "SEVENTH" of his Will, computed by use of the prescribed actuarial Table and the Federal Estate Tax Regulations?

Statutes and Regulations Involved

The Statutes and Regulations involved are set forth in Appendix C and pertain to a marital deduction from the gross estate of a decedent.

Statement of the Case

Sol Schildkraut (herein referred to as "decedent") died on September 24, 1959, a resident of the State of New York (R. Vol. 1, 18a). His Executors filed the Federal Estate Tax Return on December 15, 1960, with the District Director, Brooklyn, New York (R. Vol. I, 18a).

Decedent was survived by his widow, Golda Perl Dickerson Schildkraut, who was born on April 12, 1912, and was 47 years of age on the date of decedent's death (R. Vol. I, 18a).

Decedent's Will, executed on August 9, 1959, was admitted to probate on December 8, 1959, in the Surrogate's Court, Queens County, New York (R. Vol. I, 18a). His nephews, Eugene and Lester Schildkraut, were appointed and qualified as Executors, and as Trustees of the Trust provided for by the Article "SEVENTH" of his Will, reading as follows (R. Vol. I, 18a-19a, 24a-25a):

> "SEVENTH: I direct my Executors to set aside in trust out of my estate the sum of Three hundred thousand ($300,000.00) Dollars. I give, devise and bequeath the same to the Trustees hereinafter named, IN TRUST, NEVERTHELESS, to hold, manage, invest and re-invest the same, to collect the income, and out of the net income, and if the net income is insufficient then out of the principal, to pay to my wife, GOLDA PERL DICKERSON SCHILDKRAUT, the sum of One thousand ($1,000.00) Dollars on the first day of each calendar month during her lifetime. Until the trust herein provided is established, I direct my Executors to pay to my wife, GOLDA PERL DICKERSON SCHILDKRAUT, the sum of One thousand ($1,000.00) Dollars a month out of the income of my general estate. In the event, said GOLDA PERL DICKERSON SCHILDKRAUT, is required to pay Federal and State Income Taxes on said sums paid to her from this trust, these Federal and State Income Taxes should be paid for her from the principal of the said trust. I further direct that during the period of time said GOLDA PERL DICKERSON SCHILDKRAUT, retains ownership of the real property at 202 Indian Road, Palm Beach, Florida, situated in the Town of Palm Beach, Palm Beach County, Florida, all real estate Taxes on said property to be paid from the principal of the trust fund. The payments of all real estate Taxes on the real property at 202 Indian Road, Palm Beach, Florida, situated in the Town of Palm Beach, Palm Beach County, Florida, are to cease upon sale or transfer of said real property by GOLDA PERL DICKERSON SCHILDKRAUT. I further direct

that any income in said trust in excess of the Twelve thousand ($12,000.00) Dollars per year required to be paid to said GOLDA PERL DICKERSON SCHILDKRAUT be paid each year to THE SCHILDKRAUT FOUNDATION, INC., 35 West 35th Street, New York City, New York, a charitable corporation established under the laws of the State of New York. Upon the death of my wife, GOLDA PERL DICKERSON SCHILDKRAUT, the remaining principal of said trust fund and accumulated income remaining in the hands of the Trustees, I direct be distributed to THE SCHILDKRAUT FOUNDATION, INC., to devote the said sums to the charitable objects and purposes of the said corporation."

The Schildkraut Foundation, Inc., "has the attributes necessary to entitle the estate to a charitable deduction" (368 F. 2d 41-42; R. Vol. II, 4).

On the date of his death, decedent owned a parcel of residential real property on Indian Road, Palm Beach, Florida, valued for estate tax purposes at $65,000.00 (R. Vol. I, 19a). This property, which is the real property mentioned in Article "SEVENTH" of decedent's Will, was specifically devised to his widow (R. Vol. I, 19a). The annual real estate tax on this property on the date of decedent's death was $1,115.00 (R. Vol. I, 19a).

The value of decedent's gross estate at the date of his death was $994,505.83, and the value of his adjusted gross estate was $931,025.30 (R. Vol. I, 19a).

Respondent allowed marital and charitable deductions in the sums of $103,365.47 and $106,040.00, respectively (R. Vol. I, 20a). No part of said sums included any part of the $300,000.00 Trust provided for by Article "SEVENTH" of decedent's Will for the benefit of his surviving spouse and the charity (R. Vol. I, 19a).

Respondent determined a deficiency of estate tax liability of $116,991.65 (R. Vol. I, 4a). On petition for a re-

determination of the deficiency, the Tax Court of the United States upheld respondent's determination (R. Vol. I, 40a).

The basis for federal jurisdiction in the Tax Court, the federal court of first instance, is Sections 6213 and 7442 of Title 26 of the United States Code.

In the Tax Court and the Court of Appeals petitioners claimed a marital deduction of $107,766.98 and a charitable deduction of $55,431.55, and a reduction of the deficiency assessment to the gross sum of $59,919.53 (R. Vol. II, 5).

The $107,766.98 claimed charitable deduction is the commuted value of the invasions of principal of the Trust, as computed in Appendix D, *infra*, as follows:

Item 1, Invasion to pay deficit of income	$107,861.46
Item 2, Invasion to pay federal income taxes	38,639.48
Item 3, Invasion to pay real estate taxes	29,112.65
	$175,613.59

The commuted value of these Items, determined as of decedent's surviving spouse's age of 47, and by the Federal Estate Tax Regulations, Section 20.2031-7, Table I (Federal Estate Tax Regulations (1966), Vol. 2, pp. 238-240) is $107,766.98 computed as follows:

$107,861.46 ÷ 26.11 years life expectancy =	$ 4,131.04
38,639.48 ÷ 26.11 years life expectancy =	1,479.87
29,112.65 ÷ 26.11 years life expectancy =	1,115.00
$175,613.59 ÷ 26.11 years life expectancy =	$ 6,725.91

$4,131.04 x 15.8388 x 1.0189 (monthly factor) =	$ 66,667.36
$1,479.87 x 15.8388 =	23,439.36
$1,115.00 x 15.8388 =	17,660.26
	$107,766.98

The $55,431.55 claimed charitable deduction is the commuted value of the Trust Fund remaining after deduction of the invasions of principal commuted as follows by Federal Estate Tax Regulations, Section 20.2031-7, Table I (Federal Estate Tax Regulations (1966), Vol. 2, pp. 238-240):

$300,000 — $175,613.59 (invasions of principal) = $124,386.41 x .44564 (age 47) = $55,431.55

The Tax Court denied any marital or charitable deduction for any part of the $300,000 Trust Fund (R. Vol. I, 21a-40a).

On petition for review, the Court of Appeals:

a) Affirmed denial of any marital deduction on the ground that decedent's surviving spouse "has no power of appointment" (368 F. 2d 44, R. Vol. II, 10), but found that the amounts of invasions of principal, as computed by petitioners as aforesaid, were arrived at by acceptable standards " 'fixed in fact and capable of being stated in terms of money' " (368 F. 2d 47, R. Vol. II, 17), involving " 'no uncertainty appreciably greater than the general uncertainty that attends human affairs' " (368 F. 2d 49, R. Vol. II, 19).

b) Reversed denial of any charitable deduction, and held that a charitable deduction should be allowed for the commuted value of the sum remaining after deducting the sum of the invasions of principal. Subject to further proceedings, if any, as the Tax Court may allow, the charitable deduction allowed is $55,431.55, computed as aforesaid (368 F. 2d 49, R. Vol. II, 10, 21).

Reasons for Allowance of Writ

I. The Court of Appeals, with respect to the marital deduction issue, has decided an important question of federal estate tax law in a way probably in conflict with the applicable provisions of the Internal Revenue Code of 1954.

The Internal Revenue Code, 26 U.S.C. 2056 (b) (5), provides as follows:

> "LIFE ESTATE WITH POWER OF APPOINTMENT IN SURVIVING SPOUSE.—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse.—
>
> (A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and
>
> (B) no part of the interest so passing shall, for purposes of paragraph (1) (A), be considered as passing to any person other than the surviving spouse. This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events."

The Estate Tax Regulations, Section 20.2056(b)-5, specify five conditions that must be satisfied to qualify a specific portion of a trust for a marital deduction, viz. (Federal Estate Tax Regulations (1966), Vol. 2, p. 298):

> "(1) The surviving spouse must be entitled for life to all of the income from the entire interest or a specific portion of the entire interest, or to a specific portion of all the income from the entire interest.

(2) The income payable to the surviving spouse must be payable annually or at more frequent intervals.

(3) The surviving spouse must have the power to appoint the entire interest or the specific portion to either herself or her estate.

(4) The power in the surviving spouse must be exercisable by her alone and (whether exercisable by will or during life) must be exercisable in all events.

(5) The entire interest or the specific portion must not be subject to a power in any other person to appoint any part to any person other than the surviving spouse."

It is not required, as the Regulations specify, Section 20.2056(b)-5(c) (Federal Estate Tax Regulations (1966), Vol. 2, p. 299), that a "specific portion" constitute a "fractional or percentile share." Such regulation was disapproved in *Gelb* v. *C. I. R.* (C. A. 2, 1962), 298 F. 2d 544.

The specific portion here involved satisfies the aforesaid five conditions:

1. Decedent's surviving spouse is entitled for life to all the income from the specific portion (it may not reasonably be assumed that the $107,766.98 value of the specific portion will yield more than $12,000 per year), and to "a specific portion ($12,000) of all the income from the entire interest."

2. The income from such specific portion is payable monthly.

3. Decedent's surviving spouse has a power to appoint the specific portion to herself.

4. Such power of appointment is exercisable by the surviving spouse alone and in all events.

5. The specific portion is not subject to a power of appointment in any other person.

The invasions of principal, mandated by decedent's Will, clearly constitute an unrestricted legacy equivalent to a fee simple estate. Decedent's surviving spouse is the "virtual owner" of the $107,766.98 specific portion; she is entitled to all the principal thereof and to all the income therefrom.[1]

The Court of Appeals erred in denying any marital deduction on the ground that decedent's surviving spouse "has no power of appointment" (368 F. 2d 44, R. Vol. II, 10). The requirements for a qualifying specific portion do not include a general power of appointment. The requirement of Section 2056(b)-5 is a power in the surviving spouse to appoint the specific portion "to either herself or her estate." The Federal Estate Tax Regulations, indeed, define a power of appointment to include a power "to appropriate or consume the principal of a trust." Section 20.2041-1(b), provides (Federal Estate Tax Regulations (1966), Vol. 2, pp. 262-263):

> "The term 'power of appointment' includes all powers which are in substance and effect powers of appointment regardless of the nomenclature used in creating the power and regardless of local property law connotations. For example, if a trust instrument provides that the beneficiary may appropriate or consume

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[1] See Sen. Rep. No. 1013 (Part 2), 80th Cong., 2nd Sess. (1948—1 Cum. Bul. 331, 342), where the report states that these provisions "have the effect of allowing a marital deduction with respect to the value of property transferred in trust * * * where the surviving spouse by reason of her right to income and a power of appointment is the virtual owner of the property. This provision is designed to allow the marital deduction for such cases where the value of the property over which the surviving spouse has a power of appointment will (if not consumed), be subject to either the estate tax or the gift tax in the case of such surviving spouse" (U. S. Code Congressional Service, 1948, Vol. 2, p. 1238).

the principal of the trust, the power to consume or appropriate is a power of appointment.'"[2]

New York law is in accord with this regulation, *Matter of Baker* (Surrogate's Ct., N. Y. Co., 1961), 32 Misc 2d 762, 228 N.Y.S. 2d 588. New York Real Property Law (McKinney's Book 49, Part I), as recently amended, effective June 1, 1965, expressly provides that a power "is an authority to do an act in relation to property, whether real, personal or mixed" (Sec. 131); that a "power of appointment * * * is a power created or reserved by a person having property subject to his disposition, enabling the donee of the power to designate, within such limits as the donor may prescribe, the transferees of the property or the shares in which it shall be received" (Sec. 132); and that a "power of appointment is imperatve when the terms of its creation impose on the donee a duty to exercise it" (Sec. 135). These amendments, which were designed to retain existing law and spell out the major aspects of the common law (McKinney's Session Laws of New York, 1964, p. 1574), compel the conclusion that the power to consume here involved is a power of appointment. The donee of the power is enabled to designate, within the limits prescribed by the donor, the transferees of the principal to be consumed, and, under the terms of its creation, it is imperative that the power be exercised.

II. The Court of Appeals, with respect to the marital deduction issue, has decided an important question of federal estate tax law in a way probably in conflict with decisions of other Federal Courts of Appeals, or which has

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[2] This also was true under the Revenue Act of 1948. Sen. Rep. No. 1013, in discussing the conditions to qualify property transferred in trust for the marital deduction, states: "A 'power to appoint' the corpus includes any power which in substance and effect is such a power regardless of the nomenclature used in creating the power and local property law connotations." (U. S. Code Congressional Service, 1948, Vol. 2, p. 1239).

not been, but should be, passed upon by this Court; indeed, a question involved in two cases now pending in this Court.[3]

The decision of the Court of Appeals denying any marital deduction on the ground that decedent's surviving spouse "has no power of appointment" (368 F. 2d 44, R. Vol. II, 10), is contrary to the decision of the Seventh Circuit Court of Appeals in *Citizens National Bank of Evansville* v. *United States* (1966), 359 F. 2d 817, petition for certiorari pending, No. 488, which in turn is contrary to the *en banc* decision, three Judges dissenting, of the Third Circuit Court of Appeals in *Northeastern Pennsylvania National Bank & Trust Company* v. *United States* (1966), 363 F. 2d 476, certiorari granted, December 5, 1966, No. 637, 87 S. Ct. 509.

The Court of Appeals erred in distinguishing the *Citizens National Bank* case on the ground that it is "not apposite because the widow there had a general power of appointment over the corpus of the trust" (368 F. 2d 44, R. Vol. II, 9-10). The widow in that case had a general power to appoint, not the "corpus of the trust," but the "remainder of the trust" (359 F. 2d 818), i.e., the portion thereof remaining after payment to decedent's widow for life of monthly installments of $200 and $300, the commuted value of which was held to be a "specific portion" qualifying for the marital deduction.

In *Northeastern Pennsylvania National Bank & Trust Co.* v. *United States* (C. A. 3, *en banc*, 1966), 363 F. 2d 476, certiorari granted, December 5, 1966, No. 637, 87 S. Ct. 509, also relied upon by the Court of Appeals (368 F. 2d 44, R. Vol. II, 10), the widow also did not have a general power of appointment, but rather a power to appoint the

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[3] *Citizens National Bank of Evansville* v. *United States* (C. A. 7, 1966), 359 F. 2d 817, petition for certiorari pending, No. 488; *Northeastern Pennsylvania National Bank & Trust Company* v. *United States* (C. A. 3, 1966, *en banc*), 363 F. 2d 476, certiorari granted 12-5-66, No. 637, 87 S. Ct. 509.

portion remaining after payment to her of a specified monthly stipend.

The Court of Appeals also erred in distinguishing *Nettz* v. *Phillips* (D. C. Iowa, 1962), 202 F. Supp. 270, "also" on the ground that the surviving spouse had a "general" power of appointment over the corpus of the trust (368 F. 2d 44, footnote 7, R. Vol. II, 10). In that case the Court said, page 272:

> "* * * There is no limitation on the survivor's right to dispose of the property in any manner she sees fit during her lifetime, however, this does not include the right to make testamentary disposition of any property existing at her death."

The surviving spouse in the *Nettz* case, therefore, did not have a "general" power of appointment. The Court, nevertheless, held that her power to use and dispose of the property during her lifetime qualified the bequest for allowance of the marital deduction. The Court said (202 F. Supp. 270, 272):

> "* * * plaintiff contends that where the surviving spouse has the unrestricted right to dispose of the property during her lifetime without the power to devise, the weight of authority allows the marital deduction. *McGehee* v. *Commissioner*, 1958, 5 Cir. 260 F. 2d 818; *Geyer* v. *Bookwalter*, 1961, W. D. Mo. 193 F. Supp. 57; *Carlson* v. *Patterson*, 1961, D. C. Ala., 190 F. Supp. 452. This court is of the view that Taxpayer's contentions in this regard must be sustained. The statute itself uses the disjunctive 'or' and the regulations contemplate that if the surviving spouse possesses the unrestricted power to use all or any part of the property during her lifetime that is sufficient."

Consistent with the decision in the *Nettz* case, the District Court, Eastern District of Missouri, in *Allen* v. *United*

States (1965), 250 F. Supp. 155, cited with approval by the Seventh Circuit of Appeals in the *Citizens National Bank* case, *supra,* held that a widow's right to invade principal of a trust to the extent of $5,000 in any one calendar year qualified as a specific portion marital deduction interest. The Court said, page 157:

> "* * * The $5,000 in question qualifies as a specific portion of the corpus and may be deducted as a marital deduction."

See also: *First National Bank of Janesville* v. *Nelson* (E. D. Wis., 1964), 233 F. Supp. 860, 863, aff'd (C. A. 7, 1966), 355 F. 2d 546; *Decker* v. *United States* (S. D. Ill. N. D., 1965), 245 F. Supp. 255, 257.

III. The Court of Appeals, with respect to the marital deduction issue, has decided a question of Federal estate tax law of importance to the taxpaying public and jurisprudence in a way probably untenable, and plainly inequitable since the entire principal of the Trust here involved must go to decedent's surviving spouse and to a qualified charitable foundation having tax exempt status.

Both the Tax Court and the Court of Appeals recognized that disallowance of marital and charitable deductions in this case is inequitable. The Tax Court said that the argument for the deductions is "appealing * * * from a general equitable standpoint since it is clear under the will that the funds will either go for the use and benefit of the widow or be left to charity" (R. Vol. I, 32a). The Court of Appeals said (368 F. 2d 49, R. Vol. II, 21), "a crucial fact here certainly is that the entire corpus must go in whole or in part either to the widow or to the Foundation, both tax-free recipients if the corpus were bequeathed to them directly."

It is, therefore, probably untenable and contrary to jurisprudence not to give full effect to this "equitable"

factor; this "appealing" and "crucial" fact. To do so would do no violence to the manifest purpose of the federal estate tax law not to tax the property of a decedent which, no matter what the variables, must go to "tax-free recipients." The boundaries of the "never-never land," which the Court of Appeals here said "the tax laws at times creates" (368 F. 2d 49, R. Vol. II, 20), should not be extended to defeat this purpose. Especially is this true in the light of the settled rule that the marital deduction provision is to be liberally construed (*United States* v. *First National Bank & T. Co.* (C. A. 5, 1961), 297 F. 2d 312, 317; *Dougherty* v. *United States* (C. A. 6, 1961), 292 F. 2d 331, 337); *Moore* v. *United States* (D. S. W. D. Ky., 1963), 214 F. Supp. 603, 611).

In *Citizens National Bank* v. *United States, supra,* the Court of Appeals said (359 F. 2d 817, 819-820):

> "* * * The 'terminable interest' limitation was intended to prevent an escape from tax liability of the second step, i.e., the passing of the surviving spouse's interest 'to any other person' upon termination of her life estate or other terminable interest without estate or gift tax."

This possible escape from tax liability is not here present, since the entire Trust Fund, come what may, must go to "tax-free recipients." The element of the usual law of averages risk in actuarial tables is, therefore, virtually eliminated. The commuted value of each $1.00 of invasion of principal shown in Appendix D is .61361¢,[4] whereas, the commuted value of each $1.00 of the remainder interest is .44564¢.[5] Accordingly, every dollar of trust principal not

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[4] Commuted value ..... $107,766.98 / Total invasion ..... $175,613.59 = .61361%

[5] Federal Estate Tax Regulations (1966), Vol. 2, pp. 238-240, Sec. 20.2031—7, Table I, Column 4, at age 47.

actually consumed by decedent's surviving spouse would, in effect, reduce the marital deduction by .61361¢ and increase the charitable deduction by .44564¢.

The greatest margin for error in the deductions claimed is, therefore, .16797% of $300,000 or $50,391.00. But to make this error it would be necessary:

a) That the entire $300,000 be consumed by decedent's surviving spouse, in which case the commuted value thereof would be	$184,083.00
or	
b) That the entire $300,000 go to charity, in which case the commuted value thereof would be	$133,692.00
Difference	$ 50,391.00[6]

This greatest margin for error is slight compared with the possible margin for error under the Federal Estate Tax Regulations. If the prior estate here involved were a life estate, with no power of invasion, the commuted value of the charitable remainder would be $133,692.00[7]. But if the life tenant died a few months after the decedent, the charity would actually receive the entire $300,000.00, and the margin for error would be $166,318.00 or .55436%.

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[6] Significantly, the mean between these two extremes is $158,887.50 and is remarkably close to the total of $163,198.53 petitioners claim as marital and charitable deductions.

[7] $300,000.00 x .44564 (age 47) = $133,692.00 (Federal Estate Tax Regulations (1966), Vol. 2, pp. 238-240, Sec. 20.2031—7, Table I).

Conclusion

WHEREFORE, it is respectfully prayed that this petition for certiorari be granted.

Respectfully submitted,

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CHARLES M. MCCARTY,
Counsel for Petitioners.

January, 1967.

APPENDIX A

Opinion of the United States Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 354—September Term, 1965.

(Argued May 24, 1966 Decided October 27, 1966.)

Docket No. 30223

ESTATE OF SOL SCHILDKRAUT, Deceased; EUGENE SCHILDKRAUT and LESTER SHILDKRAUT, Executors,

Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Before:

FRIENDLY, HAYS and FEINBERG,

Circuit Judges.

Petition to review a decision of the Tax Court, Irene F. Scott, *J.*, 24 CCH Tax Ct. Mem. 1215, which denied charitable and marital deductions to the estate. Petition denied as to the marital deduction; as to the charitable deduction, the Tax Court is reversed.

CHARLES M. MCCARTY, Brooklyn, N. Y. (George C. Wildermuth, on the brief), *for Petitioners.*

SOLOMON L. WARHAFTIG, Washington, D. C. (Mitchell Rogovin, Assistant Attorney General; Lee A. Jackson, Melva M. Graney, Attorneys, on the brief), *for Respondent.*

FEINBERG, *Circuit Judge*:

The issue in this case is whether a decedent's estate should be denied both a marital and charitable estate tax deduction for the corpus of a trust even though the entire corpus must ultimately go either to decedent's widow or to a bona fide charity. For reasons set forth below, we conclude that the decision of the Tax Court to deny both deductions was unjustified; we hold that at least a charitable deduction is warranted.

The facts before us are not complex. Sol Schildkraut, a New York resident, died testate on September 24, 1959; the value of his estate was slightly under one million dollars.[1] He was survived by his widow, Golda Perl Dickerson Schildkraut, who was forty-seven years old at his death. Article Seventh of his will created a trust with the principal amount of $300,000; his executors were directed to pay to Mrs. Schildkraut during her lifetime $1,000 a month out of income of the trust and if the income was insufficient, out of principal. The executors were also directed to pay out of the trust corpus federal and state income taxes on any sums paid to the widow from the trust and the real estate taxes on certain property in Florida so long as she continued to own it. Any trust income in excess of $12,000 a year was to be paid to The Schildkraut Foundation, Inc. ("the Foundation"), a New York charitable corporation. Upon the death of Mrs. Schildkraut, the remaining principal of the trust and

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[1] Decedent's gross estate was valued at $994,505.83, and his adjusted gross estate at $931,025.30.

accumulated income vested in the Foundation.[2] The Foundation has the attributes necessary to entitle the estate to a charitable deduction.

After some preliminary changes of position, petitioners Eugene Schildkraut and Lester Schildkraut, executors of the estate, sought in the Tax Court a charitable deduction of $55,431.55, or a marital deduction for all or part of the

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[2] Article Seventh of the will provided as follows:

Seventh: I direct my Executors to set aside in trust out of my estate the sum of Three hundred thousand ($300,000.00) Dollars. I give, devise and bequeath the same to the Trustees hereinafter named, In Trust, Nevertheless, to hold, manage, invest and re-invest the same, to collect the income, and out of the net income, and if net income is insufficient then out of the principal, to pay to my wife, *Golda Perl Dickerson Schildkraut,* the sum of One thousand ($1,000.00) Dollars on the first day of each calendar month during her lifetime. Until the trust herein provided is established, I direct my Executors to pay to my wife, *Golda Perl Dickerson Schildkraut,* the sum of One thousand ($1,000.00) Dollars a month out of the income of my general estate. In the event, said *Golda Perl Dickerson Schildkraut,* is required to pay Federal and State Income Taxes on said sums paid to her from this trust, these Federal and State Income Taxes should be paid for her from the principal of the said trust. I further direct that during the period of time said *Golda Perl Dickerson Schildkraut,* retains ownership of the real property at 202 Indian Road, Palm Beach, Florida, situated in the Town of Palm Beach, Palm Beach County, Florida, all real estate Taxes on said property to be paid from the principal of the trust fund. The payments of all real estate Taxes on the real property at 202 Indian Road, Palm Beach, Florida, situated in the Town of Palm Beach, Palm Beach County, Florida, are to cease upon sale or transfer of said real property by *Golda Perl Dickerson Schildkraut.* I further direct that any income in said trust in excess of the Twelve thousand ($12,000.00) Dollars per year required to be paid to said *Golda Perl Dickerson Schildkraut* be paid each year to *The Schildkraut Foundation, Inc.,* 35 West 35th Street, New York City, New York, a charitable corporation established under the laws of the State of New York. Upon the death of my wife, *Golda Perl Dickerson Schildkraut,* the remaining principal of said trust fund and accumulated income remaining in the hands of the Trustees, I direct be distributed to *The Schildkraut Foundation, Inc.,* to devote the said sums to the charitable objects and purposes of the said corporation.

$300,000 principal of the trust.[3] The Tax Court denied any deduction with respect to any part of the $300,000 corpus of the trust. 24 CCH Tax Ct. Mem. 1215 (1965). In their petition for review in this court, the executors claim a marital deduction of $107,766.98 for the commuted value of property interests which passed to decedent's surviving spouse and a charitable deduction of $55,431.55 for the commuted value of the charitable remainder.

I

Marital Deduction

Petitioners' claim to an estate tax marital deduction is based upon sections 2056(a) and (b) of the Internal Revenue Code of 1954. The former allows as a marital deduction from the value of decedent's gross estate "an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse." However, interests that are terminable do not qualify for the deduction, presumably because they are not the equivalent of interests owned outright by a surviving spouse in a community-property state.[4] The terminable interest rule is, therefore, an exception to the marital deduction; it requires disallowance where the interest passing to a surviving spouse terminates or fails "on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event of contingency to occur." Int. Rev. Code § 2056(b)(1). Since Mrs. Schildkraut's interest in the $300,000 trust fund clearly termi-

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[3] There were other issues before the Tax Court; we confine our summary of the facts and proceedings to what is relevant to this petition.

[4] That the purpose of the marital deduction was to equalize estate tax treatment for married persons residing in community-property and in common-law states, see *United States* v. *Stapf*, 375 U. S. 118, 128 (1963).

nated upon her death, petitioners rely upon an exception to the exception. This is contained in Int. Rev. Code § 2056(b)(5), which qualifies a terminable interest for the marital deduction if it is a life estate with a power of appointment in the surviving spouse. This section provides:

> In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—
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> (A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and
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> (B) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.
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> This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

Thus, an interest in property that is terminable on the death of a surviving spouse will nevertheless qualify for the deduction if the spouse "is entitled for life to all the

income from the entire interest, or all the income from a specific portion thereof," and has the power to appoint the entire interest or such specific portion. It is the "specific portion" concept that concerns us here.

Petitioners argue that with respect to a "specific portion" of the trust, a life estate with power of appointment did indeed pass to the widow. The claimed "specific portion" is composed of three elements: a sum equal to the difference between the $12,000 required to be paid annually to the widow and the assumed lesser annual income of the trust ("item 1"); a sum sufficient to pay federal and state income taxes on payments from the trust to the widow ("item 2"); and a sum sufficient to pay the annual real estate taxes on the Florida property ("item 3"). Petitioners claim that these sums can be accurately computed by making various reasonable assumptions as of decedent's death; *e.g.*, the trust will earn interest at 3½ per cent per year; income taxes are based on 1959 rates for a single person having one exemption and taking the standard deduction; the widow's life expectancy is 26.11 years. On this basis, petitioners have made detailed calculations showing the sums for the three items to be, respectively, $107,861.46, $38,639.48, and $29,112.65, for a total of $175,613.59. The commuted value of this total using the federal estate tax regulations, according to petitioners,[5] is $107,766.98; this is the marital deduction claimed.

These basic assumptions are attacked by respondent. Thus, he rejects the 3½ per cent interest estimate, arguing that it cannot be said that the trust will not earn 11+ per cent per year. If the trust did earn that sum, there would be no need for invasion for the widow's benefit, and item 1 above would disappear. Similarly, he argues that it is faulty to assume that federal income tax rates in effect

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[5] Petitioners claim to use Table I, Treas. Reg. § 20.2031-7(f) (1958).

in 1959 will remain the same. This affects the computation of item 2. Also, respondent characterizes as without basis the assumptions that the widow will retain the Florida real estate for 26.11 years and that taxes on that property will remain the same; this affects item 3.

A Treasury regulation requires the "specific portion," referred to in section 2056(b)(5), to "constitute a fractional or percentile share of a property interest."[6] In *Gelb* v. *Commissioner*, 298 F. 2d 544, 549 (2d Cir. 1962), we pointed out that prior to the 1954 Code, unless all of a trust qualified for a marital deduction, no part of it would, and that the 1954 Code introduced a new concept—the qualifying "specific portion." Construing the provision as a liberalization of prior law, we disapproved the regulation and held that the "specific portion" may be a dollar amount and even one determined by actuarial calculation of life expectancy. Yet, reliance on *Gelb* is not sufficient for petitioners here. In that case, in sharp contrast to

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[6] The regulation, § 20.2056(b)-5(c) (1958), provides:

Definition of "specific portion."

A partial interest in property is not treated as a specific portion of the entire interest unless the rights of the surviving spouse in income and as to the power constitute a fractional or percentile share of a property interest so that such interest or share in the surviving spouse reflects its proportionate share of the increment or decline in the whole of the property interest to which the income rights and the power relate. Thus, if the right of the spouse to income and the power extend to one-half or a specified percentage of the property, or the equivalent, the interest is considered as a specific portion. On the other hand, if the annual income of the spouse is limited to a specific sum, or if she has a power to appoint only a specific sum out of a larger fund, the interest is not a deductible interest. Even though the rights in the surviving spouse may not be expressed in terms of a definite fraction or percentage, a deduction may be allowable if it is shown that the effect of local law is to give the spouse rights which are identical to those she would have acquired if the size of the share had been expressed in terms of a definite fraction or percentage. . . .

this, Gelb's widow had a general power of appointment over the corpus of the trust. Petitioners argue that this deficiency is met here by the widow's power to consume the corpus of the trust in items 1, 2 and 3, and it is true that, depending upon the accuracy of the assumptions already referred to, a substantial portion of the corpus may be paid out to the widow from the trust. However, those whose power is only to stand and wait for a monthly stipened do not thereby have a power of appointment. Moreover, if Mrs. Schildkraut were to die tomorrow, none of the amounts predicted as future invasions would be taxable in her estate, see Int. Rev. Code § 2041(b)(1)(A), a consideration which may not be decisive but is highly significant. "Thus the marital deduction is generally restricted to the transfer of property interests that will be includible in the surviving spouse's gross estate." *United States* v. *Stapf*, 375 U. S. 118, 128 (1963) (footnote omitted). But *cf.* Note, *Powers to Consume and the Marital Deduction*, 39 N. Y. U. L. Rev. 504 (1964). Moreover, we agree with the Tax Court that even if power to direct invasion of the corpus were considered to be in the widow—a most questionable assumption—the power would still not be a qualifying power of appointment. *Estate of May* v. *Commissioner*, 283 F. 2d 853 (2d Cir. 1960), cert. denied, 366 U. S. 903 (1961); *United States* v. *Lincoln Rochester Trust Co.*, 297 F. 2d 891 (2d Cir.), cert. denied, 369 U. S. 887 (1962). But see *In the Matter of the Estate of Baker*, 32 Misc. 2d 762, 228 N.Y.S. 2d 588 (Surr. Ct. 1961). Petitioners cite *Citizens Nat'l Bank* v. *United States*, 359 F. 2d 817 (7th Cir. 1966) (2-1), but that case is not apposite because the widow there had a general power of appointment over the corpus of the trust.[7] See also *Northeastern Pa. Nat'l Bank & Trust Co.* v. *United States*, 363 F. 2d 476 (3d Cir. 1966) (*en banc*) (5-3), relied on by

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[7] This is also true of *Nettz* v. *Phillips*, 202 F. Supp. 270 (S. D. Iowa 1962), cited to us by petitioner.

respondent. Because Mrs. Schildkraut has no power of appointment, the Tax Court here denied the marital deduction. We hold that this conclusion was correct.

II

Charitable Deduction

Petitioners claim that they are entitled to a charitable deduction of $55,431.55 for the commuted value of the charitable remainder to the Foundation. Int. Rev. Code § 2055(a) provides that, for the purpose of the estate tax, "the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers" to bona fide charitable organizations. Petitioners arrive at their claimed figure by subtracting the uncommuted value they ascribed to the "invasions" for the widow's benefit ($175,613.59) from the trust corpus ($300,000). This leaves a difference of $124,386.41, which petitioners commute to a present value of $55,431.55. Respondent argues that no charitable deduction is warranted since there is a real possibility that the Foundation will get nothing; petitioners reply that respondent is taking inconsistent positions. *Cf.* 1B Moore, Federal Practice ¶ 0.405[8] (2d ed. 1965); Note, *The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings,* 59 Harv. L. Rev. 1132 (1946).

There is considerable force to petitioners' complaint. In opposing the charitable deduction, respondent accepts petitioners' assumption that the trust will earn only 3½ per cent income; if Mrs. Schildkraut lived to be 84 (eleven years past her claimed actuarial life expectancy), she would then consume the trust corpus by the yearly invasions required to pay her $12,000 annually, leaving nothing for the Foundation. However, in contesting the marital deduction, respondent emphasizes that the trust may earn 11+ per cent per year, which would make such a trust invasion unnecessary. If this is so, then, of course, peti-

tioners' estimate of what will ultimately go to the Foundation is extremely conservative, since this projected invasion (item 1 above) is by far the largest assumed depletition of the trust corpus. This sort of whipsawing of a taxpayer is hardly appealing; however, the issue still must be whether the charitable deduction is permitted under the applicable law.

Respondent relies principally upon *Commissioner* v. *Estate of Sternberger,* 348 U. S. 187 (1955), and *Bankers Trust Co.* v. *United States,* 299 F. 2d 936 (2d Cir. 1962), affirming *per curiam* 190 F. Supp. 671 (S. D. N. Y. 1960) and 191 F. Supp. 792 (S. D. N. Y. 1961), cert. denied, 371 U. S. 814 (1962). In *Sternberger,* the issue was whether a deduction would be allowed for a charitable bequest that would take effect only if decedent's childless, unmarried, 27-year-old daughter died without descendants surviving her and her mother. The executor conceded that the chance the charity would not take was much more than negligible. 348 U. S. at 194. It did claim, however, that the various contingencies involved could be actuarially analyzed so that some estimate of the worth of the charity's remainder interest could be reasonably made. The Court stated (348 U. S. at 197-98):

> If respondent is successful, it means the allowance of an immediate and irrevocable deduction of over $175,000 from the gross estate of decedent, although respondent admits there is a real possibility that charity will receive nothing. The bequest, in fact, offers to the daughter an inducement of about $2,000,000 to remarry and leave a descendant. To the extent that this inducement reduces the actuarially computed average probability that charity will receive this bequest, it further demonstrates the inappropriateness of authorizing charitable tax deductions based upon highly conditional bequests to charity.
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> An even clearer illustration of the effect of respondent's interpretation of the code readily suggests

itself. If decedent had here conditioned his bequest to charity solely on the death of his daughter before remarriage, the Remarriage Table would then fix the present value of the charitable remainder at .18384 on the dollar. The taxpayer would at once receive a substantial charitable deduction on that basis. The daughter, however, would have a $2,000,000 inducement to remarry. If she did so, her action would cancel the possibility that charity would receive anything from the bequest, but it would not cancel the tax deduction already allowed to the estate. To whatever extent any person can defeat the fulfillment of any condition upon which a benefit to charity depends, to that extent the actuarial estimate that such benefit will reach charity is less dependable. The allowance of such a tax reduction as is here sought would open a door to easy abuse. The result might well be not so much to encourage gifts inuring to the benefit of charity as to encourage the writing of conditions into bequests which would assure charitable tax deductions without assuring benefits to charity.

Thus, in a case where an ordinary and highly common set of events (marriage and having a child with a normal life-span), made all the more probable by a $2,000,000 inducement, could cut off the charity entirely, the Supreme Court held it would be inappropriate to allow a charitable deduction. The present stricture on improbable bequests relied on by respondent, Treas. Reg. § 20.2055-2(b) (1958) provides in relevant part:

> *Transfers subject to a condition or a power.* If, as of the date of a decedent's death, a transfer for charitable purposes is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that the charitable transfer will not become effective is so

> remote as to be negligible. If an estate or interest has passed to or is vested in charity at the time of a decedent's death and the estate or interest would be defeated by the performance of some act or the happening of some event, the occurrence of which appeared to have been highly improbable at the time of the decedent's death, the deduction is allowable. If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, the deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of the power.

Respondent argues that because Mrs. Schildkraut may survive her actuarial life expectancy by eleven years, the possibility that the Foundation will take nothing here is not "so remote as to be negligible."

We think that the applicable authorities do not require disallowance of the claimed charitable deduction here. First, in *Sternberger,* the life tenant was given a volitional power and a strong incentive to defeat the charitable interest. The situation was similar in *Bankers Trust Co.,* in which the charitable bequest would fail if a 47-year-old married woman gave birth for the first time; this court affirmed the district court's denial of the deduction. In this case, however, Mrs. Schildkraut has no significant power, combined with incentive, to diminish the expectancy of the Foundation, since she has nothing to do with the fixing of the amounts comprising items 1, 2 and 3; the only conceivable action she could take to diminish the trust corpus and, therefore, the sum ultimately vesting in the Foundation is to move to a state where there is an income tax. That would hardly be occasioned solely by the trust's payment of such a tax, although the move might thereby be made more attractive. Of course, it could be argued that

the widow's survival is volitional in the sense that a life can be cut short voluntarily. Such a characterization would not only be "preposterous," see *United States* v. *Dean*, 224 F. 2d 26, 28 (1st Cir. 1955), but irrelevant, since no one can choose to live past a certain date, the only contingency that would diminish the Foundation's expectancy. See 55 Colum. L. Rev. 924, 926 (1955). Second, this is not a case where defeat of the charitable interest would be unfair to the government because "it would not cancel the tax deduction already allowed to the estate." *Commissioner* v. *Estate of Sternberger*, 348 U. S. 187, 198 (1955). In *Sternberger*, defeat of the charitable interest meant that the bequest would go to the daughter's descendants instead; similarly, in *Bankers Trust Co.*, the bequest would go to the issue of decedent's secretary. In both, to the extent that a charitable deduction was allowed, the estate tax ordinarily payable on the bequest to the daughter's descendants (*Sternberger*) or the issue (*Bankers Trust*) would be irretrievably lost. Here, if the charity takes nothing, it can only be because the entire corpus is paid out to the widow, and a direct bequest to her would qualify for the marital deduction; therefore, in principle no otherwise proper tax on a direct bequest would be lost. There is no chance of "easy abuse," see *Sternberger*, 348 U. S. at 198, when defeat of the charitable interest occurs only if the widow takes all the corpus and the latter amounts to less than one-half of the adjusted gross estate.[8]

Therefore, *Sternberger* and *Bankers Trust Co.* do not require disallowance of the entire charitable deduction here; nor does an examination of other relevant Supreme Court

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[8] Even if the entire $300,000 in the trust were left to the widow, the maximum possible marital deduction would not be exceeded. The estate is allowed a marital deduction of up to 50% of the value of the adjusted gross estate, Int. Rev. Code § 2056(c)(1), and the only other marital deduction allowed to this estate has been $103,365.47. See 24 CCH Tax Ct. Mem. at 1217.

cases lead us to that result. A dual strain runs through them: a charitable deduction will be denied where the expectancy of the charity can be controlled or substantially affected by the volitional act of the life tenant or where a standard for invasion that might diminish the corpus going to a charity is not objectively fixed. Thus, deductions were denied in *Henslee* v. *Union Planters Nat'l Bank & Trust Co.*, 335 U. S. 595 (1949); *Merchants Nat'l Bank* v. *Commissioner*, 320 U. S. 256 (1943); and *Humes* v. *United States*, 276 U. S. 487 (1928), but allowed in *United States* v. *Provident Trust Co.*, 291 U. S. 272 (1934), and *Ithaca Trust Co.* v. *United States*, 279 U. S. 151 (1929). In *Henslee*, the Court pointed out that the will did not limit invasions to conformity with some ready standard since the income to be paid to decedent's mother was "to be used by her as she sees fit," and the trustee's power to invade was for the mother's "pleasure, comfort and welfare"; the Court emphasized that there was a chance that the mother "would abandon her customary frugality and squander her son's wealth." 335 U. S. at 599. In *Merchants Nat'l Bank*, invasion was allowed for the "comfort, support, maintenance, and/or happiness" of decedent's wife; the Court held that this was not "a fixed standard based on the widow's prior way of life." 320 U. S. at 261. In *Humes*, the charitable bequest would be defeated if a 15-year-old niece had a child before the age of 40; the niece could clearly affect the probability of this occurrence. On the other hand, in *Provident Trust Co.*, a daughter could no longer choose to have issue—the event which would defeat a charitable bequest—because an operation had made this "plainly impossible." 291 U. S. at 286. In *Ithaca Trust Co.*, the Court emphasized that the standard for invasion ("to suitably maintain . . . [the widow] in as much comfort as she now enjoys") was "fixed in fact and capable of being stated in definite terms of money. It was not left to the widow's discretion." 279 U. S. at 154.[9] See also *Lincoln Rochester Trust Co.* v. *McGowan*, 217 F. 2d 287 (2d Cir.

1954); *Lincoln Rochester Trust Co.* v. *Commissioner*, 181 F. 2d 424 (2d Cir. 1950).

For reasons already made plain, there is no significant volitional power in Mrs. Schildkraut to defeat the Foundation's expectancy. Moreover, the standards for invasion here are "fixed in fact and capable of being stated in definite terms of money." There is nothing vague or subjective about a command to make up the difference between actual income and $12,000 a year, or to pay defined taxes. We realize that this does not end the matter; a charitable bequest dependent upon the sun falling in the ocean could not be defeated by human volition, but would not be deductible either.

The key assumption in assessing probabilities is that the trust income will be 3½ per cent. Petitioners suggest this rate on the assumption that the marital deduction is allowed, and it would be unfair to hold them to it for that reason alone. In attacking the marital deduction, respondent exhibited extraordinary optimism about the trust's earning capacity, envisioning a possible rate of over eleven per cent. If respondent were held to that prediction, the probable invasion of the corpus would be quite small and the chance that Mrs. Schildkraut would exhaust the corpus extremely remote. Moreover, it would not be necessary to go that far; even a shift in assumed earnings rate from 3½ to four per cent would materially affect the assumed amount going to the Foundation. A rate of four per cent might be justified by various factors, including the following: in this circuit, it was held in 1959-1960 that triers of fact in personal injury cases should be instructed to use a minimum discount rate of four per cent in computing the

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[9] The Court also noted that the income of the estate at the testator's death was more than sufficient to maintain the widow as required, which made invasion unlikely.

[10] *Conte* v. *Flota Mercante del Estado*, 277 F. 2d 664, 670 (2d Cir. 1960); *Alexander* v. *Nash-Kelvinator Corp.*, 271 F. 2d 524, 527 (2d Cir. 1959).

present value of money to be earned in the future;[10] and in other contexts, although respondent now employs an interest rate of 3½ per cent, at least for purposes of determining present value of money to be received in the future,[11] he has employed at other times an interest rate of four per cent.[12] However, we are willing to accept the 3½ per cent earnings assumption in assessing probabilities as of September 1959, although we might question its use for periods commencing at times when such a rate would obviously be unrealistic.

Using a 3½ per cent rate, respondent points to the possibility that Mrs. Schildkraut may live long enough (to age 84, twelve years past her life expectancy) for the annual invasions necessary with this low income rate to wipe out the trust corpus; relying on the first sentence of Treas. Reg. § 20.2055-2(b) (1958), respondent argues that this possibility is not "so remote as to be negligible." However, we do not agree that the test there stated controls this case. This is not an "either-or" situation in which the happening of an event, whose probability has to be ascertained, wipes out a charitable interest entirely. Rather, this is a case with a series of non-volitional possibilities of corpus invasion, *e.g.*, surviving to age 72, to age 73, etc., each of which tends to diminish, but does not eliminate, the charitable remainder. As we have already said, we do not read the Supreme Court decisions as requiring use in these circumstances of the "so remote as to be negligible" test at all. There is a contrary precedent, where the key question was whether survival past life expectancy would wipe out a trust corpus, see *Estate of Moffett* v. *Commis-*

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[10] *Conte* v. *Flota Mercante del Estado*, 277 F. 2d 664, 670 (2d Cir. 1960); *Alexander* v. *Nash-Kelvinator Corp.*, 271 F. 2d 524, 527 (2d Cir. 1959).

[11] Treas. Reg. § 20.2031-7(f) (1958).

[12] See *Simpson* v. *United States*, 252 U. S. 547 (1920); Treas. Reg. 105, § 81.10(j) (1952); Campbell, *Valuation of Life Estates and Remainders*, in Proceedings of New York University Eleventh Annual Institute on Federal Taxation 633 (1953).

sioner, 269 F. 2d 738 (4th Cir. 1959), but we think the result reached there was required neither by precedent nor policy. See 54 Mich. L. Rev. 433 (1956). But cf. *United States* v. *Dean,* 224 F. 2d 26 (1st Cir. 1955) (either-or situation; court reluctantly denied deduction). We feel that the proper test here is whether there is an interest that is "presently ascertainable," see Treas. Reg. § 20.2055-2(a) (1958),[13] and "assurance," see *Sternberger,* 348 U. S. at 199, that the Foundation will receive it.

Applying this standard, there is here "no uncertainty appreciably greater than the general uncertainty that attends human affairs." *Ithaca Trust Co.* v. *United States,* 279 U. S. at 154. Use of a life expectancy for Mrs. Schildkraut of 26.11 years, based purely on actuarial computation, is justifiable, at least in the absence of objection to the accuracy of the table used or evidence that in this particular case actual life expectancy would be materially different. Cf. *Hall* v. *United States,* 353 F. 2d 500 (7th Cir. 1965), 66 Colum. L. Rev. 797 (1966) (rejecting Commissioner's contention that valuation of reversionary interest for purpose of estate taxation may not be based upon evidence of actual life expectancy as opposed to use of standard tables). Respondent also attacks petitioners' assumption that the 1959 income tax and the Florida real estate tax rates will remain constant. (Actually, respondent's argument, to be relevant here, questions the assump-

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[13] Treas. Reg. § 20.2055-2(a) (1958) provides:

Remainders and similar interests. If a trust is created or property is transferred for both a charitable and a private purpose, deduction may be taken of the value of the charitable beneficial interest only insofar as that interest is presently ascertainable, and hence severable from the non-charitable interest. The present value of a remainder or other deferred payment to be made for a charitable purpose is to be determined in accordance with the rules stated in § 20.2031-7. Thus, if money or property is placed in trust to pay the income to an individual during his life, or for a term of years, and then to pay the principal to a charitable organization, the present value of the remainder is deductible. . . .

tion that tax rates will not go up; if tax rates go down, invasions are less and the Foundation receives more.) Respondent apparently goes along with petitioners' assumption (made for marital deduction purposes) that the widow will keep the Florida property throughout her life. While tax rates may not be as certain as taxes, this court has recognized that tax rates are stable enough to furnish a basis for predictions in personal injury cases, e.g., *Le Roy* v. *Sabena Belgium World Airlines*, 344 F. 2d 266, 276 (2d Cir.), cert. denied, 382 U. S. 878 (1965) (damages for wrongful death). It is equally sound to use here federal and state tax rates prevailing as of the date of decedent's death. Respondent also argues that petitioners do not take into account the possibility of state income taxes. The state income tax rate to use should be that of the state that could properly tax Mrs. Schildkraut's income as of the date of decedent's death. Cf. *Estate of Brooks* v. *Commissioner*, 250 F. 2d 937 (3d Cir. 1958). Petitioners claim that Florida is that state and that Florida not only has no income tax but also has a constitutional provision prohibiting such a tax.[14] Be that as it may, we see no reason why it is not fair to both respondent and the taxpayer to focus only on the facts as of decedent's death on this issue as on others; *e.g.*, the widow is assumed to keep the Florida property for her lifetime, although she might sell it (this, of course, would increase the corpus to be left to the Foundation by decreasing the real estate taxes).

Viewing the uncertainties just enumerated, we find the charitable deduction to be justified. We realize that the tax laws at times create a never-never land; *e.g.*, a business that loses money thereby acquires a valuable tax loss; a taxpayer can make money by giving away property to charity rather than by selling it.[15] But it is not necessary

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[14] See Fla. Const. art. IX, § 11.

[15] See Surrey & Warren, Federal Income Taxation 322 n.* (1962) (example under then applicable rates).

to ignore reality in administering the tax laws. Each of the assumptions just made is reasonable and is frequently applied in other areas of the law. Moreover, a crucial fact here certainly is that the entire corpus must go in whole or in part either to the widow or to the Foundation, both tax-free recipients if the corpus were bequethed to them directly. Accordingly, we reverse the Tax Court and direct allowance of the charitable deduction.

The petition is denied as to the marital deduction; as to the charitable deduction, the decision of the Tax Court is reversed.

FRIENDLY, *Circuit Judge*, concurs in the result.

APPENDIX B

Judgment on Order of Court of Appeals.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of October, one thousand nine hundred and sixty-six.

Present: HON. HENRY J. FRIENDLY,
HON. PAUL R. HAYS,
HON. WILFRED FEINBERG,
Circuit Judges.

Estate of SOL SCHILDKRAUT, Deceased, EUGENE SCHILDKRAUT and LESTER SCHILDKRAUT, Executors,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPEALS FROM THE TAX COURT OF THE UNITED STATES

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed as to the claimed marital deduction but as to the claimed charitable deduction the order be and it hereby is reversed in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk.

APPENDIX "C"

Statutes and Regulations Involved

Statutes

INTERNAL REVENUE CODE 1954

"Sec 2056. *Bequests, etc., to surviving spouse* (a) Allowance of marital deduction.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) Limitation in the case of life estate or other terminable interest.—

(1) General rule.—Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest—

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under subparagraphs (A) and (B))—

(C) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

* * * *

(5) Life estate with power of appointment in surviving spouse.—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

(A) the interest or such portion thereof so passing shall for purposes of subsection (a), be considered as passing to the surviving spouse, and

(B) no part of the interest so passing shall, for purposes of paragraph (1) (A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

* * * * * *

(c) Limitation on aggregate of deductions.—

(1) General rule.—The aggregate amount of the deductions allowed under this section (computed without regard to this subsection) shall not exceed 50 percent of the value of the adjusted gross estate, as defined in paragraph (2)."

* * * *

Regulations

FEDERAL ESTATE TAX REGULATIONS (1966), Vol. 2, pp. 238-241, 262, 288, 298-299.

"Sec. 20.2031-7 *Valuation of annuities, life estates, terms for years, remainders and reversions*—(a) *In general*, (1) The fair market value of annuities, life estates, terms for years, remainders and reversions is their present value, determined under this section, except in the case of annuities under contracts issued by companies regularly engaged in their sale. * * *.

(2) The present value of an annuity, life estate, remainder or reversion determined under this section which is dependent on the continuation or termination of the life of one person is computed by the use of Table I in paragraph (f) of this section. * * *

* * * *

(f) The following tables shall be used in the application of the provisions of this section:

Table I

Table, single life, 3½ percent, showing the present worth of an annuity, of a life interest, and of a remainder interest

1	2	3	4
Age	Annuity	Life Estate	Remainder
*	*	*	*
47	15.8388	.55436	.44564"
*	*	*	*

"Sec. 20.2041-1 *Powers of appointment; in general*—(a) * * *.

(b) *Definition of 'power of appointment'*—(1) *In general.* The term 'power of appointment' includes all powers which are in substance and effect powers of appointment regardless of the nomenclature used in creating the power and regardless of local property law connotations. For example, if a trust instrument provides that the beneficiary may appropriate or consume the principal of the trust, the power to consume or appropriate is a power of appointment. * * *."

* * * *

"Sec. 20.2056(b)-5 *Marital deduction; life estate with power of appointment in surviving spouse*—(a) *In general.* Section 2056(b)(5) provides that if an interest in property passes from the decedent to his surviving spouse (whether or not in trust) and the spouse is entitled for life to all the income from the entire interest or all the income from a specific portion of the entire interest, with a power in her to appoint the entire interest or the specific portion, the interest which passes to her is a deductible interest, to the extent that it satisfies all five of the conditions set forth below (see paragraph (b) of this section if one or more of the conditions is satisfied as to only a portion of the interest):

(1) The surviving spouse must be entitled for life to all of the income from the entire interest or a specific portion of the entire interest, or to a specific portion of all the income from the entire interest.

(2) The income payable to the surviving spouse must be payable anually or at more frequent intervals.

(3) The surviving spouse must have the power to appoint the entire interest or the specific portion to either herself or her estate.

(4) The power in the surviving spouse must be exercisable by her alone and (whether exercisable by will or during life) must be exercisable in all events.

(5) The entire interest or the specific portion must not be subject to a power in any other person to appoint any part to any person other than the surviving spouse.

(b) *Specific portion; deductible amount.* If either the right to income or the power of appointment passing to the surviving spouse pertains only to a specific portion of a property interest passing from the decedent, the marital deduction is allowed only to the extent that the rights in the surviving spouse meet all of the five conditions described in paragraph (a) of this section. While the rights over the income and the power must coexist as to the same interest in property, it is not necessary that the rights over the income or the power as to such interest be in the same proportion. However, if the rights over income meeting the required conditions set forth in paragraph (a) (1) and (2) of this section extend over a smaller share of the property interest than the share with respect to which the power of appointment requirements set forth in paragraph (a) (3) through (5) of this section are satisfied, the deductible interest is limited to the smaller share. Correspondingly, if a power of appointment meeting all the requirements extends to a smaller portion of the property interest than the portion over which the income rights pertain, the deductible interest cannot exceed the value of the portion to which such power of appointment applies. Thus, if the decedent leaves to his surviving spouse the right to receive annually all of the income from a particular property interest and a power of appointment meeting the specifications prescribed in paragraph (a) (3) through (5) of this section as to only one-half of the property interest, then only one-half

of the property interest is treated as a deductible interest. Correspondingly, if the income interest of the spouse satisfying the requirements extends to only one-fourth of the property interest and a testamentary power of appointment satisfying the requirements extends to all of the property interest, then only one-fourth of the interest in the spouse qualifies as a deductible interest. Further, if the surviving spouse has no right to income from a specific portion of a property interest but a testamentary power of appointment which meets the necessary conditions over the entire interest, then none of the interest qualifies for the deduction. In addition, if, from the time of the decedent's death, the surviving spouse has a power of appointment meeting all of the required conditions over three-fourths of the entire property interest and the prescribed income rights over the entire interest, but with a power in another person to appoint one-half of the entire interest, the value of the interest in the surviving spouse over only one-half of the property interest will qualify as a deductible interest.

(c) *Definition of specific portion.* A partial interest in property is not treated as a specific portion of the entire interest unless the rights of the surviving spouse in income and as to the power constitute a fractional or percentile share of a property interest so that such interest or share in the surviving spouse reflects its proportionate share of the increment or decline in the whole of the property interest to which the income rights and the power relate."

APPENDIX "D"

COMPUTATIONS SHOWING ANNUAL SUMS PAYABLE OUT OF CORPUS OF $300,000.00 TRUST DURING LIFE EXPECTANCY OF DECEDENT'S SURVIVING SPOUSE TO PAY TO HER:

1. $12,000.00 PER ANNUM.
2. FEDERAL INCOME TAXES ON ANNUAL INCOME SHE RECEIVES FROM TRUST.
3. REAL ESTATE TAXES ON PALM BEACH, FLORIDA, REAL PROPERTY.

INTEREST COMPUTED AT RATE OF 3½% PER ANNUM FOR 26.11 YEARS OF LIFE EXPECTANCY OF DECEDENT'S SURVIVING SPOUSE ACCORDING TO COMMISSIONERS' STANDARD ORDINARY TABLE (1958) C.C.H. FEDERAL ESTATE AND GIFT TAX REPORTER, VOL. 2, PAR. 7120, PAGE 6450.*

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* According to American Experience Table of Mortality, decedent's surviving spouse has a life expectancy of 23.08 years. Her life expectancy is 29.36 years according to the United States Life Table prepared by the Bureau of Census (See, Jones Legal Forms, Vol. 3, Sec. 60.1, p. 541). The Commissioners' Ordinary Standard Table is the approximate average of these tables.

Original Trust Corpus—$300,000.00

Year	*Interest at 3½% per annum*	*Invasion to pay $12,000 per year*	*Invasion to pay Income Taxes*	*Invasion to pay real Estate Taxes*	*Remainder*
1	$ 10,500.00	$ 1,500.00	$ 2,266.00	$ 1,115.00	$295,119.00
2	10,329.17	1,670.83	2,207.92	1,115.00	290,125.25
3	10,154.38	1,845.62	2,148.49	1,115.00	285,016.14
4	9,975.56	2,024.44	2,088.52	1,115.00	279,788.18
5	9,792.58	2,207.42	2,032.53	1,115.00	274,433.23
6	9,605.16	2,394.84	1,975.18	1,115.00	268,948.21
7	9,413.18	2,586.82	1,921.56	1,115.00	263,324.83
8	9,216.37	2,783.63	1,868.42	1,115.00	257,557.78
9	9,014.52	2,985.48	1,813.92	1,115.00	251,643.38
10	8,807.51	3,192.49	1,758.03	1,115.00	245,577.86
11	8,595.23	3,404.77	1,700.71	1,115.00	239,357.38
12	8,377.51	3,622.49	1,641.93	1,115.00	232,977.96
13	8,154.23	3,845.77	1,581.64	1,115.00	226,435.55
14	7,925.24	4,074.76	1,519.82	1,115.00	219,725.97
15	7,690.41	4,309.59	1,456.41	1,115.00	212,844.97
16	7,449.57	4,550.43	1,391.38	1,115.00	205,788.16
17	7,202.59	4,797.41	1,318.88	1,115.00	198,556.87
18	6,949.49	5,050.51	1,114.18	1,115.00	191,277.18
19	6,694.70	5,305.30	1,054.56	1,115.00	183,802.32
20	6,433.08	5,566.92	993.34	1,115.00	176,127.06
21	6,164.45	5,835.55	930.48	1,115.00	168,246.03
22	5,888.61	6,111.39	865.49	1,115.00	160,154.15

Year	*Interest at 3½% per annum*	*Invasion to pay $12,000 per year*	*Invasion to pay Income Taxes*	*Invasion to pay real Estate Taxes*	*Remainder*
23	5,605.40	6,394.60	805.87	1,115.00	151,838.68
24	5,314.35	6,685.65	748.24	1,115.00	143,289.79
25	5,015.14	6,984.86	688.98	1,115.00	134,500.95
26	4,707.53	7,292.47	747.00	1,115.00	125,346.48
11/100	482.59	837.42	—0—	122.65	$124,386.41
Totals	$205,458.55				175,613.59
		$107,861.46	$38,639.48*	$29,112.65	$300,000.00

$205,458.55 ÷ 26.11 = $7,868.96
$107,861.46 ÷ 26.11 = $4,131.04
$ 38,639.48 ÷ 26.11 = $1,479.87
$ 29,112.65 ÷ 26.11 = $1,115.00

*Income taxes computed at 1959 rates for a single person, having one exemption and taking the standard deduction (Internal Revenue Code, 1954, Secs. 1, 141, 151).

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 991

ESTATE OF SOL SCHILDKRAUT, DECEASED, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The decedent's will created a trust in the principal amount of $300,000, and directed the trustees to pay to his widow during her lifetime $1,000 per month out of trust income and, to the extent that income was insufficient, out of principal. The trustees were also directed to pay out of trust principal the federal and State income taxes on any sums paid to the widow from the trust, and the real estate taxes on certain property in Florida so long as she continued to own it. Any trust income in excess of $12,000 per year was to be paid to a designated charitable foundation. Upon the death of the widow, the remaining principal of the trust and any accrued income vested in the Foundation.

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The decision of the courts below that the trust did not qualify for the "marital deduction" is correct.[1] It is not, as petitioners assert (Pet. 7, 11), "probably in conflict" with the applicable provisions of the Code or the decisions of other courts of appeals. Nor is there any other reason for further review.

The widow's interest in the trust was clearly a "terminable interest" as defined in 1954 Code §2056(b)(1), since upon her death all of her interest in the trust terminated, and the trust property passed to someone other than her estate, *i.e.*, to the Foundation. Therefore, her interest in the trust does not qualify for a marital deduction unless it fits within Code § 2056(b)(5)'s exception to the terminable interest rule.

Section 2056(b)(5) grants a marital deduction only if the widow is entitled for life to all the income from a specific portion of the trust corpus plus a general power to appoint the specific portion of the corpus to herself or her estate. Whether the right to a fixed amount of income (here $12,000 per year) constitutes all the income from a specific portion of a trust is the

[1] The Tax Court held that no part of the trust qualified for either the marital deduction or the charitable deduction. The court of appeals reversed with respect to the charitable deduction and held that the trust qualified for such a deduction to the extent of the commuted value of the Foundation's remainder interest. Although we believe that the court of appeals erred in reversing the Tax Court's disallowance of the claimed charitable deduction, the government does not intend to file a petition for certiorari.

question now before this Court in two pending cases.[2] However, the Court need not hold this case pending outcome of those cases, since, in no event, does the widow have a general power of appointment over any portion of the trust corpus. On the contrary, the trust instrument gave the widow no explicit power of appointment over trust corpus, and she would have the right to obtain trust corpus for herself or her estate only to the extent that the trustee paid corpus to her during her lifetime.

Petitioner argues that if the widow lives for the period predicted by the mortality tables (26.11 years), the trustee will probably pay to her approximately $107,000 of corpus (Pet. 6). However, it is undisputed that if she had died shortly after her husband, neither she nor her estate would have received any part of the trust corpus. The Treasury Regulations clearly provide that a widow has the required power over trust corpus only if she has power, "alone and in all events," to designate herself or her estate as the recipient of trust corpus. Treas. Reg. § 20.2056 (b)–5(g). As this Court has recognized, the allowability of a marital deduction is "judged as of the time of the testator's death," *Jackson* v. *United States*, 376 U.S. 503, 509, and here it was impossible to predict at "the time of [decedent's] death" whether his widow would receive any corpus at all. Since she

[2] *Northeastern Pennsylvania Nat. B. & T. Co.* v. *United States*, 363 F. 2d 476 (C.A. 3), certiorari granted December 5, 1966, No. 637, this Term; *Citizens National Bank of Evansville* v. *United States*, 359 F. 2d 817 (C.A. 7), petition for certiorari pending, No. 488, this Term.

thus did not have a general power of appointment over trust corpus "exercisable alone and in all events," no marital deduction is allowable.[3]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
HARRY BAUM,
SOLOMON L. WARHAFTIG,
Attorneys.

FEBRUARY 1967.

[3] The instant case is therefore wholly unlike the cases cited by petitioner (Pet. 12–14), where the surviving spouses had unconditional powers to dispose of trust corpus either during their lifetimes or by will, alone and in all events, even if they had died shortly after the decedent.

Nor does the fact that upon the termination of the widow's interest part of the trust corpus will be distributed to charity qualify her terminable interest for a marital deduction. See *United States* v. *Quivey*, 292 F. 2d 252 (C.A. 8); *Darby's Estate* v. *Wiseman*, 323 F. 2d 792 (C.A. 10). An interest passing to a surviving spouse qualifies for the marital deduction only where it satisfies the test specified by Congress. See *Jackson* v. *United States*, *supra*, pp. 509–511.

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